## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA EASTERN DIVISION No. 4:03-CR-14-H No. 4:12-CV-156-H

This matter is before the court on petitioner's motion to vacate or set aside his sentence pursuant to 28 U.S.C. § 2255, which was filed July 29, 2012 [DE #64] and amended on August 3, 2012 [DE #65]. On August 23, 2012, the government filed a response, deliberately waiving its statute of limitations defense with respect to petitioner's claim seeking relief from his sentence on the ground that he is not an armed career criminal under the reasoning of <u>United States v. Simmons</u>, 649 F.3d 237 (4th Cir. 2011). The government further agrees that petitioner's motion has merit and presents a cognizable claim for relief under § 2255 with respect to his status as an armed career criminal. The government objects, however, to the claims raised in petitioner's amendment to his § 2255 motion, arguing that these claims are procedurally barred.

For the reasons stated in the government's response to petitioner's motion, the court GRANTS petitioner's <u>Simmons</u> claim and DISMISSES petitioner's remaining claims for failure to state a claim upon which relief may be granted. The court VACATES its judgment, entered October 14, 2003 and amended on March 23, 2006. This matter is SCHEDULED for resentencing at the court's October 9, 2012, criminal term. The United States Probation Office is DIRECTED to provide the parties and the court with a resentencing memorandum.

This 6th day of September 2012.

MALCOLM J. HOWARD

Senior United States District Judge

At Greenville, NC #31